UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MANJEET DINESHBHAI KANTI, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 98B00070
MR. CHITRANJAN PATEL C/O BLIMPIE, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO SET ASIDE ENTRY OF DEFAULT

(August 4, 1998)

I. INTRODUCTION

This Order centers around whether I should set aside my prior entry of default and accept Respondent's late Answer to the Complaint. To decide that question, I must consider the following three main issues:

(1) whether Respondent's failure to answer the Complaint on time was willful;

(2) whether setting aside the entry of default will prejudice Complainant; and

(3) whether Respondent presents a meritorious defense to the action.

For the reasons discussed in detail below, I find that the balance of the above factors weighs in favor of setting aside my prior entry of default. As a result, I GRANT Respondent's Motion and accept his Answer for filing.

II. BACKGROUND

On May 8, 1998, Manjeet Dineshbhai Kanti (Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleges that Chitranjan Patel C/O Blimpie (Respondent) discriminatorily fired him because of his citizenship status, Compl. Pt. I ¶¶ 14, 15; Pt. II ¶¶ 1, 2, intimidated, threatened, coerced or retaliated against him because he filed or planned to file a complaint, Compl. Pt. III ¶ 1, and refused to accept the documents that he

presented to show he can work in the United States, Compl. Pt. IV ¶ 1. According to the signed certified return receipt card, Respondent received the Complaint on May 16, 1998. The Rules of Practice and Procedure that govern OCAHO proceedings provide that a respondent must file a written answer to the complaint within thirty days after the service of a complaint. See 28 C.F.R. § 68.9(a) (1997). Although service of all other pleadings is effective at the time of mailing, service of a complaint is not effective until it is received. See id. § 68.8(c)(1). In this case, the answer should have been filed not later than June 16, 1998. See id. §§ 68.9(a), 68.8(a). "File" means that the document must be received in my office by the given date, not that it merely must be postmarked by then. See id. § 68.8(b).

As my office still had not received an answer by June 30, 1998, I issued a Notice of Default on that date in which I entered a default similar to that specified in Federal Rule of Civil Procedure 55(a) and warned that Respondent should act promptly in filing an answer to avoid a default judgment and should explain why it did not file an answer in a timely manner. The OCAHO Rules of Practice provide that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by [the OCAHO Rules], the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." Id. § 68.1. As a courtesy, I served Louis S. Goldberg, Esq., with a copy of the Notice of Default. Mr. Goldberg had represented Respondent in a collateral matter concerning a subpoena served on Respondent by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), but neither Mr. Goldberg nor any other attorney had entered an appearance for Respondent in this case.

On July 10, 1998, Mr. Goldberg served a Notice of Appearance and Answer on behalf of Respondent. On the same date, Respondent also served its Motion to Set Aside Default Judgment with an accompanying affidavit. Although Respondent has filed a Motion to Set Aside Default Judgment, I will treat it and refer to it as a motion to set aside entry of default, as I merely have entered an entry of default, rather than a default judgment, as of this time. Complainant was entitled to respond to Respondent's Motion on or before July 27, 1998. See id. ¶¶ 68.11(b), 68.8(a), (c)(2). To date, Complainant has not filed a response to the motion to set aside entry of default.

III. LEGAL ANALYSIS AND DISCUSSION

"For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). As I merely have entered Respondent's default and not an actual default judgment against Respondent, the standard found in Rule 55(c), rather than the more stringent Rule 60(b) standard, is the appropriate one to apply. See Meehan v. Snow, 652 F.2d 274, 276 (2d Cir. 1981) ("[T]he standard for setting aside the entry of a default pursuant to Rule 55(c) is less rigorous than the 'excusable neglect' standard for setting aside a default judgment by motion pursuant to Rule 60(b)"); see also American Alliance Ins. Co., Ltd. v. Eagle Ins. Co., 92 F.3d 57, 59 (2d Cir. 1996); Bobrow Greenapple & Skolnik v. Woods, 865 F.2d 43, 44 (2d Cir. 1989); John Davis v. GTE Florida Inc., OCAHO Case No. 97B00087, at 4 (Aug. 12, 1997); Hendrickson v. GTE Communication Systems Corp., OCAHO Case No. 97B00089, at 4 (Aug. 12, 1997).

Despite the less rigorous standard for setting aside an entry of default, courts consider the same factors utilized in setting aside a default judgment, such as (1) whether the default was willful, (2) whether setting aside the entry will prejudice the opposing party; and (3) whether the defaulting party presents a meritorious defense to the action. See Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993) ("Although the factors examined in deciding whether to set aside a default or a default judgment are the same, courts apply the factors more rigorously in the case of a default judgment because the concepts of finality and litigation repose are more deeply implicated in the latter action") (internal citation omitted); Benz v. Department of Defense, Defense Finance & Accounting Serv., OCAHO Case No. 97B00115, 1997 WL 572135, at *2 (Sept. 8, 1997); see also, e.g., Brien v. Kullman Indus., Inc., 71 F.3d 1073, 1077 (2d Cir. 1995) (applying factors in context of motion to vacate default judgment); Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 243 (2d Cir. 1994) (applying factors in context of Rule 55(c) and opposition to entry of default judgment); Brock v. Unique Racquetball and Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986) (applying factors in context of request to set aside entry of default); Davis v. Musler, 713 F.2d 907, 915 (2d Cir. 1983) (applying factors in context of motion to vacate default judgment). A motion to set aside entry of default is left to the sound discretion of the trial court. See Enron Oil, 10 F.3d at 95; Marziliano v. Heckler, 728 F.2d 151, 156 (2d Cir. 1984). The trial court's discretion is not unlimited, and the appellate court may reverse the trial court's decision "even where the abuse [is] not glaring." Enron Oil, 10 F.3d at 95. "[B]ecause defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party. In other words, 'good cause' . . . should be construed generously." Id. at 96; see also D'Amico v. Erie Community College, 7 OCAHO 927, at 2-3 (1997) (denying motion for default judgment in favor of reaching decision on the merits and citing, inter alia, Enron Oil, 10 F.3d at 95-96).

The application of the above factors to the present case weighs in favor of setting aside my prior entry of default and accepting Respondent's late-filed Answer. Respondent did not fail to answer the Complaint in a timely fashion because of willful disregard or disrespect for the legal process. Instead, Respondent asserts that his delay in responding to the Complaint occurred because he believed that "this matter had been resolved pursuant to the terms of the Agreement which had been negotiated among the Claimant [Mr. Kanti], the Respondent and the U.S. Department of Justice [OSC]" and that "the filing of an answer was unnecessary under the circumstances." See Patel Aff. at 2. Respondent states that he executed and returned to OSC three copies of the settlement agreement, but that, on July 9, OSC returned a copy of the agreement to him, along with a letter from OSC Senior Trial Attorney Bruce Friedman explaining that Complainant had refused to sign the agreement. See id. at 2-3. Respondent has enclosed a copy of the agreement and a copy of Mr. Friedman's letter as exhibits to his motion to set aside entry of default.

Precedent from the Second Circuit is controlling in this case because judicial review may be obtained "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." 8 U.S.C. § 1324b(i)(1) (1994); see also 28 C.F.R. § 68.53(b) (1997). Even under the more rigidly applied standard of Rule 60(b), the U.S. Court of Appeals for the Second Circuit has "implied that it will look for bad faith, or at least

something more than mere negligence, before rejecting a claim of excusable neglect based on an attorney's or a litigant's error." American Alliance, 92 F.3d at 60 (finding that a defendant's failure to answer because of a filing mistake committed by its in-house counsel's clerk was grossly negligent, but did not preclude relief from default because the conduct was not willful, deliberate, or carried out in bad faith); see also SEC v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998) (interpreting "willfulness" in context of motion to set aside default judgment). Although the ideal course of action for Respondent would have been to request an extension of time to file its answer pending execution of the settlement agreement by all parties, I do not find that Respondent's failure to answer on time was willful or in any way committed in derogation of the legal process. This is not a situation in which the defaulting party simply ignored its responsibility to defend against this action or otherwise acted in bad faith.

Once Respondent became aware that this case had not in fact settled and that I had entered a default against him, he acted promptly, through his attorney, to correct the default. Mr. Goldberg prepared and served a Notice of Appearance, Answer and motion to set aside entry of default within ten days of the date I issued the Notice of Default. Only a slight delay has occurred because of Respondent's failure to answer the Complaint in a timely fashion. At any rate, mere delay in and of itself is insufficient to establish prejudice to the opposing party. See Enron Oil, 10 F.3d at 98; Davis, 713 F.2d at 916. "Rather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.'" Id. (quoting 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure: Civil, § 2699 at 536-37 (1983)). There is no indication, nor even any allegation, that Complainant would suffer those harms if I grant Respondent's Motion.

Finally, I must consider whether Respondent has presented any meritorious defenses to the Complaint. In its Answer, Respondent denies the central allegations of the Complaint. Respondent denies that he discriminatorily fired Complainant because of his citizenship status, that he intimidated, threatened, coerced or retaliated against Complainant because he filed or planned to file a complaint, and that he refused to accept the documents that Complainant presented to show he can work in the United States. See Ans. at 1-2. Respondent has not otherwise elaborated on the facts in support of his position.

Whether moving to set aside an entry of default or an actual default judgment, the defaulting party need not conclusively establish the defense. See McNulty, 137 F.3d at 740 (in context of motion to set aside default judgment); American Alliance, 92 F.2d at 61 (in context of motion to set aside default judgment); Enron Oil, 10 F.3d at 98 (in context of request to set aside entry of default). Beyond that principle, however, different decisions from the U.S. Court of Appeals for the Second Circuit provide potentially conflicting guidance as to what the defaulting party must do to satisfy the meritorious defenses element. In a 1993 opinion, the Court stated that "[a] defendant seeking to vacate an entry of default must present some evidence beyond conclusory denials to support his defense." Enron Oil, 10 F.3d at 98. The Court relied on that opinion in March 1998 when it stated that a defaulting party "must present evidence of facts that, 'if proven at trial, would constitute a complete defense'" McNulty, 137 F.3d at 740 (quoting Enron Oil, 10 F.3d at 98). In 1996,

however, the Court stated that "[a] defense is meritorious if it is good at law so as to give the factfinder some determination to make." American Alliance, 92 F.3d at 61 (quoting Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc., 856 F.2d 873, 879 (7th Cir. 1988)).

In Enron Oil, the Second Circuit found adequate presentation of a defense based on information in the defaulting party's prior motion to dismiss, the party's affidavits, and certain deposition testimony. For that and other reasons, the Second Circuit found in Enron Oil that the district court had abused its discretion by refusing to set aside an entry of default; the Second Circuit reversed the district court's refusal to set aside the entry of default and its entry of default judgment. In the case at hand, Respondent has not pointed to those types of evidence in support of his defense to the action. Of course, there was more of a chance for a record to have developed in Enron Oil because the default there occurred when the defendant failed to answer the second amended complaint, which was filed approximately two years after the original complaint had been filed. In another case, the Second Circuit found no abuse of discretion in a district court's implicit ruling that conclusory statements in an attorney's affidavit that the defaulting party may have a meritorious defense did not constitute an adequate presentation of a defense for purposes of setting aside an entry of default. See Marziliano, 728 F.2d at 156-57 (involving entry of default after party's failure to respond to opposing party's motion for costs and attorney's fees). In the present case, Respondent has done more than the defaulting party in Marziliano; Respondent has not merely stated in a conclusory fashion that it has a defense to the action. Instead, Respondent clearly has stated in his Answer the precise allegations he contests, indicating the existence of disputed issues in the case. Enron Oil and Marziliano provide examples on opposite ends of the spectrum of what can and what cannot constitute more than a "conclusory denial" to satisfy the meritorious defense element, but their facts do not illuminate the middle ground that presents itself in this case.

In American Alliance, however, the Second Circuit did not seem to demand more than a statement of the defense. The Court found that the defaulting party had presented a meritorious defense when it merely claimed the defense; it also found that the district court erred when it required conclusive evidence of the defense. See American Alliance, 92 F.2d at 61. Moreover, the Court relied on a Seventh Circuit decision that did not require the defaulting party to point to any evidence to present a meritorious defense for purposes of setting aside a default judgment. In the Seventh Circuit case, the party who had obtained the default judgment argued that the defaulting party failed to establish a meritorious defense because "it merely denied the allegations of the complaint." Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc., 856 F.2d 873, 879 (7th Cir. 1988). The Seventh Circuit rejected that argument, stating that "[a] defense is meritorious if it is good at law so as to give the factfinder some determination to make." Id. (quoting Bieganek v. Taylor, 801 F.2d 879, 882 (7th Cir. 1986)). The present case would fit into that standard, as articulated by the Seventh Circuit and quoted by the Second Circuit in American Alliance, because Respondent' denials in its Answer demonstrate the precise factual issues that are in dispute and that "give the factfinder some determination to make."

Based on the above, I read the Second Circuit decisions as an affirmation of the discretion placed in the hands of the trial judge to grant relief from default, or not to grant relief from default,

based on the unique facts and circumstances of each case. In the case at hand, I find that balancing the factors weighs in favor of granting Respondent relief from the prior entry of default. Respondent's failure to answer the Complaint on time was not willful, and accepting its Answer late will not prejudice Complainant. In light of the strong preference to decide cases on the merits, any doubt about what Respondent was required to demonstrate to satisfy the Second Circuit's formulation of presenting a meritorious defense is resolved in Respondent's favor. Cf. Enron Oil, 10 F.3d at 96 ("[B]ecause defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party").

IV. CONCLUSION

As a result of the balancing of the above factors, and because of the strong preference to decide cases on the merits, I GRANT Respondent's motion to set aside entry of default and accept its Answer for filing. The next step in this case will be to hold a telephone prehearing conference. The telephone prehearing conference is not the actual hearing at which testimony and other evidence are presented. Instead, the prehearing conference is an opportunity to clarify the issues in the case and to establish a procedural schedule by which the remainder of the case will progress.

Not later than August 19, 1998, the Complainant and Respondent shall file a pleading proposing alternate dates and times for the telephone prehearing conference. As previously noted, "file" means that the document must be received in my office by the given date, not that it merely must be postmarked by then. 28 C.F.R. § 68.8(b) (1997). The conference is expected to last approximately an hour and a half and will address the issues involved in this case. The date proposed by the parties for the conference must not be later than twenty days from the filing of the pleading. The parties should attempt to submit a joint pleading signed by both parties agreeing on certain dates and times for the conference. However, if the parties cannot agree, they shall file separate proposals. I will then issue a written notice setting a date and time for the conference, in which the issues raised in the Complaint and Answer will be discussed.

All requests for relief, including requests for extension of time, shall be submitted in the form of a written motion, not a letter. A party shall not move for an extension of time unless the movant has conferred or attempted to confer with the opposing party to secure that party's agreement on the extension. If the non-moving party does not object to the extension, the motion shall so indicate. If the movant has attempted to confer, but has been unable to reach the opposing party or to secure the opposing party's agreement to the extension, the motion shall so indicate by relating the steps the movant took to communicate with the opposing party. Further, the motion for an extension of time shall be filed prior to the due date.

An original and two (2) copies of all pleadings, including attachments, shall be filed with this office. 28 C.F.R. § 68.6(a) (1997). All documents filed with this office, including but not limited to motions, other pleadings and memoranda, shall have numbered pages. The parties shall not file

with the Judge any documents produced during discovery unless the documents are related to a pending motion or upon the order of the Administrative Law Judge. Id. § 68.6(b).

If the parties settle this case, they shall be responsible for submitting a written notice or motion pursuant to the requirements of 28 C.F.R. § 68.14 (1997).

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE